

ii) Deep Pockets:

The fact that Fiscus Realty was in the case only for deep pockets came to light wherein the Court stated:

"Well, you know, and I know, what it has to do with is who is going to pay, that's what this whole case is about".

"C. Stacey - Ultimately - the real estate, the broker".

"The Court - yeah, whether Mr. Fiscus, his insurance is on the hook for this, that's what this whole thing is about".

"C. Stacey - and that's not in the record, your Honor, and that's what you a Judge, would assume and 99 out of 100 times, your assumption would be absolutely correct".

"The Court - Okay well, you telling me there's no insurance doesn't matter. He's the deep pocket".

"C. Stacey - Right. Well, I'm just going to say, there is insurance from my clients, that's how I got involved in this case. So it - maybe when the case was first filed, the deep pocket was the idea, but that has all changed"
(App Doc 7 pg 191 lines 5-17).

The District Court summed up the belief as to this case wherein the Court stated that:

"... I really do trust the jury system and to have twelve people decide this case - and to be honest, my guess is they're going to say Fiscus Realty doesn't have any responsibility here. That's my guess. But it doesn't mean I'm going to grant summary judgment on that". (App Doc 7 page 198 line 5-6 and 18-20).

The District Court recognized that the Harmons were on thin ice in their claims against Fiscus Realty. The District Court recognized that the reason Fiscus Realty was a defendant in the case was for its deep pockets.

C) Fiscus Realty's Inspection of the Property:

Fiscus Realty's motion for inspection of property was filed on October 22 2009. On November 10, 2009, the Court denied Fiscus Realty's motion for inspection of property. The order denying the inspection continues the steps in arriving at Fiscus Realty's conclusion that the District Court abused its discretion in not awarding attorney fees. The District Court clearly separated Fiscus Realty from the warranty case when it stated:

ContentionTrial Evidence Against Fiscus Realty

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| 1. Negligence and Negligence Per Se | No evidence presented at trial. |
| 2. Negligence and misrepresentation | No evidence presented at trial. |
| 3. Violation of Montana Unfair trade Practices and consumer act | No evidence presented at trial. |
| 4. Violation of Montana Real Estate Licensing Act | No evidence presented at trial. |
| 5. Ostensible Agency claim | No evidence presented at trial. |
| 6. Breach of expressed or implied warranty | No evidence presented at trial. |
| 7. <u>Ostensible agency</u> | No evidence presented at trial. |

This Court must direct its attention to the special verdict form prepared by Judge Fagg. Judge Fagg, after hearing Fiscus Realty's motion for dismissal and directed verdict at the close of the Plaintiffs' case, prepared the special verdict form. On the Court's own volition all contentions were dismissed except for one question regarding a violation of the Montana Real Estate Licensing Act. Fiscus Realty contends that the fact the Court dropped six out of seven claims establishes the frivolous and unreasonable nature of this case. In focusing on Fiscus Realty's contentions, the trial testimony supports this contention. None of the allegations nor claims were ever presented by the Plaintiffs' to the jury. Fiscus Realty was ignored completely throughout the trial. Testimony establishes that Fiscus Realty was a non-party in dealing with the Plaintiffs in that there was no written listing with the owner of the property, there was no commission paid to Fiscus Realty. Fiscus Realty was not even called to the stand in Plaintiffs' case in chief.